APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 2nd day of March, 1994.

Record No. 931557
Circuit Court No. L-100865

WINCHESTER HOMES, INC.,
Appellant,

against

HOOVER UNIVERSAL, INC., *et al.*,
Appellees.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

DAVID B. BEACH
Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of April, 1994.

Record No. 931557
Circuit Court No. L-100865

WINCHESTER HOMES, INC.,
Appellant,

against

HOOVER UNIVERSAL, INC., *et al.*,
Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 100865

WINCHESTER HOMES, INC.,
Plaintiff,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Defendants.

ORDER

This day came defendants, by counsel and through the Steering Committee appointed by the Court on March 22, 1991, and the plaintiff, by counsel, on defendants' Demurrers to the Motion for Judgment filed herein. Upon consideration of the briefs and legal authorities submitted and the oral argument of counsel on May 30, 1991, it is hereby

ORDERED that defendants' Demurrers to the Motion for Judgment shall be, and the same hereby are, sustained. The plaintiff's claims alleged in the Motion for Judgment are dismissed as follows:

(1) The Motion for Judgment, in its entirety, is dismissed for lack of standing, with leave to amend as provided below, to allege standing except as to those counts specifically dismissed with prejudice.

(2) Counts I through X are dismissed, with leave to amend as provided below, on the ground that the format of the Motion for Judgment misjoins the causes of action of each preceding count into the subsequent count.

(3) Count I (Negligent Design and Manufacture) is dismissed with prejudice on the ground that plaintiff has

asserted breach of warranties in Counts V (Breach of Express Warranty), VI (Breach of Implied Warranty of Merchantability and Fitness), and VII (Breach of Implied Warranty of Fitness for a Particular Purpose), and that negligent design and manufacture is the manner in which the defendants allegedly breached these warranties.

(4) Count II (Negligent Failure to Warn) is dismissed with prejudice on the ground that plaintiff has asserted breach of warranties in Counts V (Breach of Express Warranty), VI (Breach of Implied Warranty of Merchantability and Fitness), and VII (Breach of Implied Warranty of Fitness for a Particular Purpose), and that negligent failure to warn is the manner in which the defendants allegedly breached their warranties.

(5) Count III (Strict Liability for Defective Design and Manufacture) is dismissed with prejudice.

(6) Count IV (Strict Liability for Failure to Warn) is dismissed with prejudice.

(7) Count VIII (Fraud and Fraud in the Inducement) is dismissed, with leave to amend as provided below, for failure to allege fraud with the required specificity.

(8) Count IX (Request for Declaratory Relief) is dismissed with leave to amend as provided below.

(9) Count X (The Virginia Consumer Protection Act) is dismissed with prejudice on the ground that the claims asserted by Winchester in the Motion for Judgment do not involve consumer transactions. Winchester has leave to amend to allege an assigned or subrogated claim under the Virginia Consumer Protection Act.

(10) Plaintiff's claim for injury to its business reputation is dismissed with leave to amend as provided below to include a claim for injury to business reputation to the extent recoverable in a cause of action not dismissed with prejudice herein.

(11) Plaintiff's claims against Johnson Controls, Inc. are dismissed, with leave to amend as provided below, on the ground that plaintiff's Motion for Judgment fails to allege sufficient facts to support a claim that Johnson Controls, Inc. can be held liable for the acts of Hoover Universal, Inc., now a subsidiary of Johnson Controls, Inc.

(12) Plaintiff's claims against Ply-Gem Industries, Inc. are dismissed, with leave to amend as provided below, on the ground that plaintiff's Motion for Judgment fails to allege sufficient facts to support a claim that Ply-Gem Industries, Inc. can be held liable for the acts of its subsidiary, Hoover Treated Wood Products, Inc.

It is further ORDERED that plaintiff shall have through and until June 24, 1991, within which to file an Amended Motion for Judgment, and defendants shall have 21 days after service of the Amended Motion for Judgment to file their responses thereto.

Enter: July 25, 1991

/s/ William J. Plummer
Judge

We ask for this:

Chesapeake Corporation;
Hoover Universal, Inc.;
Johnson Controls, Inc.;
Hoover Treated Wood Products, Inc.;
Mid-Atlantic Wood Preservers;
Ply-Gem Industries, Inc.;
Timber Products Inspection, Inc.;
Osmose Wood Preserving, Inc.
Applied Research Group, Inc.; and
Reliance Wood Preserving, Inc.

By Defendants' Steering Committee

/s/ Jack E. McClard
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Attorney for Defendant
Chesapeake Corporation

Seen and objected to for the following reasons:

(1) the arguments set forth in plaintiff's March 18, 1991 Consolidated Response in Opposition to defendants' Demurrers;

(2) the arguments set forth in the April 19, 1991 Reply of plaintiff to defendants' Joint and Supplemental Memorandum in Support of Demurrers;

(3) the argument of counsel at the May 30, 1991 hearing to consider the Demurrers to the Motion for Judgment;

(4) Winchester has standing by virtue of alleged injury to itself, and as subrogee to the claims of homeowners, and through the assignment of claims it has and continues to receive from homeowners;

(5) Count I (Negligent Design and Manufacture) and Count II (Negligent Failure to Warn) are recognized under the law of Virginia; the court sustained the Demurrers on these two counts on the basis that plaintiff had pled a claim for breach of warranty, however, a plaintiff may plead alternative theories of recovery, Va. Code Ann. § 8.01-281; Rule 1:4(k) of the Rules of the Supreme Court of Virginia, and may join contract and tort claims in one action, Va. Code Ann. § 8.01—272;

(6) Count VIII (Fraud and Fraud in the Inducement) is pled with the requisite specificity;

(7) Count IX (Request for Declaratory Relief) is pled properly and states a cause of action for relief under Virginia law;

(8) Count X (Virginia Consumer Protection Act) is pled properly; and

(9) Plaintiff's claims against Johnson Controls, Inc. and Ply-Gem Industries, Inc. are pled properly to hold these defendants liable for the acts, omissions and misconduct of their respective subsidiary corporations.

/s/ Michael J. McManus
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NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030

County of Fairfax City of Fairfax

April 16, 1993

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RE: *Winchester Homes, Inc. v. Hoover Universal et al.*, At Law No. 100865

Dear Counsel:

This matter comes before the Court on Defendant Hoover Treated Wood Products, Inc.'s ("Hoover Treated") Application for Judgment Notwithstanding the Verdict or for a New Trial and Plaintiff Winchester Homes, Inc.'s ("Winchester") Motion to Conform Damage Award to Evidence Presented and Motion for Sanctions. Hoover Treated contends, *inter alia*, that the Uni-

form Commercial Code ("UCC") does not apply to the plywood at issue in this case since the plywood was incorporated into realty. Winchester asserts that the jury erroneously apportioned the verdict between Winchester and a non-party and that, at any rate, no evidence supported the jury's apportionment. Winchester also asserts that Hoover Treated's Grounds of Defense failed to comply with the requirements of Va. Code Ann. § 8.01-271.1 (Repl. Vol. 1992) and that sanctions are appropriate.

Having considered the arguments and memoranda of counsel and for the reasons set forth below, the Court sustains the Application for Judgment Notwithstanding the Verdict and overrules the Motion to Conform Damage Award and the Motion for Sanctions.

FACTS

This is a products liability case brought by a builder-developer against a building supplier. The plaintiff-builder, Winchester, purchased flame retardant treated plywood ("FRTP") from the defendant-supplier, Hoover Treated, for use as roof sheathing in townhomes. Several years after construction of 1500 or more townhomes, Winchester learned that FRTP was prematurely decaying in townhome roofs and launched an inquiry. As a result of this inquiry, Winchester entered into an agreement with the homeowners to repair or replace FRTP in exchange for a release and assignment of potential legal claims. Winchester brought suit against Hoover Treated on claims involving townhome roofs, contending that the FRTP was defective, unsafe and unsuitable as roof sheathing.

This case proceeded, at differing times, on numerous theories, including negligent manufacture, negligent failure to warn, breach of the Virginia Consumer Protection Act, breach of the federal Magnuson-Moss Act, breach of implied and express warranties and indemnification

and subrogation. Winchester asserted standing to bring these claims as an assignee, subrogee or indemnitee.

On September 16, 1992, the Court heard dispositive motions before trial. Hoover Treated's Motion to Strike/Demurrer/Plea in Bar/Summary Judgment was sustained in part and overruled in part. Winchester's indemnification claim was dismissed without prejudice because the cause of action for indemnification had not accrued before the time of filing. The motion for summary judgment was sustained, the Court ruling that Winchester disclaimed the Virginia implied statutory warranties under Va. Code § 55-70.1 (Repl. Vol. 1986 & Supp. 1992) and that the express warranties that Winchester gave to the homeowners excluded "roof sheathing." Accordingly, after September 16, 1992, Winchester proceeded as the assignee of the homeowners with two remaining claims, breach of express and implied warranties under the UCC.

On the opening day of trial, Hoover Treated filed a motion in limine, asserting that the UCC did not apply to the FRTP in question since it was incorporated into realty and no longer constituted "goods." Hoover Treated also asserted that any express or implied warranties must have been given by Winchester directly to the homeowners. Winchester's theory of the case was that Hoover Treated made implied and express warranties under the UCC and that these warranties initially ran to Winchester, the buyer of the FRTP. When Winchester incorporated the plywood into townhouses, warranties passed to the homeowners under Code § 8.2-318 (Repl. 1991), the anti-privity statute.[1] The Court refused to

[1] In its memorandum opposing the Application for Judgment Notwithstanding the Verdict, Winchester asserts that the representations made in the Home Care Manual distributed to each homeowner included express warranties given by Hoover Treated. Winchester also contends that the span rating stamp printed on each sheet of FRTP was an affirmation by Hoover Treated to the homeowners that the plywood had certain strength characteristics. The Court rejects these theories for the reasons stated in Hoover

consider Hoover Treated's motion on the first day of trial due to the potential unfair prejudice to Winchester.

After three weeks of trial, the jury returned a verdict for Winchster in the amount of $434,185. The jury found that Hoover Treated breached the UCC implied warranty of fitness for a particular purpose and express warranties. The jury found that Hoover Treated did not breach the UCC implied warranty of merchantability.

Hoover Treated now renews its pre-trial objection regarding the UCC by moving for judgment notwithstanding the verdict. Winchester has responded by moving to conform the damage award to the evidence and by moving for sanctions.

DISCUSSION

I. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

Under Virginia Code § 8.01-430, a court may set aside a jury verdict and enter final judgment only where the verdict is plainly wrong or without credible evidence to support it. *Dutton v. Locker*, 224 Va. 535, 297 S.E.2d 814 (1982). A court may also grant judgment notwithstanding the verdict where the verdict is predicated on a motion for judgment that does not state a cause of action entitling the plaintiff to recover. 11A Michie's Jur. *Judgments and Decrees* § 28 at 66 (Repl. Vol. 1978); 46 Am.Jur.2d *Judgments* § 114 at 389. Such a verdict may be set aside even if the defendant failed to demur. 6A Michie's Jur. *Demurrer* § 29 (Repl. Vol. 1991); *Burke's Pleading and Practice* § 214 at 355 (4th ed. 1952); *Boyles' adm'r v. Overby*, 52 Va. (Grattan) 202, 204-05 (1854); *Mason v. Farmer's Bank*, 39 Va. (Leigh) 84, 90 (1841).

Treated's Reply. In addition, the Home Care Manual was not introduced into evidence.

Hoover Treated argues that Winchester does not have a cause of action because it is an assignee of the homeowners, and the UCC warranties did not pass to the homeowners from Hoover Treated since the homeowners purchased realty, not "goods" as defined under the UCC. The Court agrees.

Two transactions were involved in this case—the sale of FRTP between Winchester and Hoover Treated and the sale of townhomes between Winchester and the homeowners. Not surprisingly, Hoover Treated focuses on the second transaction because the UCC does not apply to the sale of realty.[2] Winchester does not contend that the UCC is applicable to real estate transactions. Instead, it argues that the Court should focus on the first transaction, in which the FRTP constituted "goods" under the UCC. This transaction, Winchester asserts, was between the builder and the component manufacturer; all warranties given to Winchester, therefore, passed to the homeowners under § 8.2-318. No Virginia case exists which addresses this issue directly. *Bruce Farms, Inc. v. Coupe*, 219 Va. 287, 288, 247 S.E.2d 400, 401 (Va. 1978), is not dispositive because in that case the suit against the component manufacturer was non-suited, and hence, the Vir-

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[2] *See, e.g., Bruce Farms, Inc. v. Coupe*, 247 S.E.2d 400, 402 n.1 (Va. 1978); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982); *Lupinski v. Heritage Homes, Ltd.*, 535 A.2d 656, 658-59 (Pa. Super. 1988); *Gable v. Silver*, 258 So. 2d 11, 17-18 (Fla. Ct. App. 1972); *Gallegos v. Graff*, 508 P.2d 798, 799 (Colo. Ct. App. 1973); *Fink v. Denbeck*, 293 N.W.2d 398, 401 (Neb. 1980); *Sponseller v. Meltebeke*, 570 P.2d 974, 976 n.3 (Or. 1977); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 429 n.3 (Ariz. 1984); *Arlen Hills North Homes Ass'n v. Pemtom, Inc.*, 475 N.W.2d 495, 499 (Minn. Ct. App. 1991); *Pollard v. Saze & Yalles Dev. Co.*, 108 Cal. Rptr. 174, 178 (Cal. Ct. App. 1973); *White v. Peabody Const. Co., Inc.*, 434 N.E.2d 1015, 1021 (Mass. 1982); *In Re Levingston*, 119 B.R. 935, 941 (Bkrtcy. N. D. Miss. 1990); *Ferguson v. Alfred Schroeder Dev. Co.*, 658 S.W.2d 62, 64 (Mo. Ct. App. 1983); *Vernali v. Centrella*, 266 A.2d 200, 203 (Conn. Ct. App. 1970); *see also* R. Anderson, *Uniform Commercial Code*, at 572-73 (3d ed. 1981).

ginia Supreme Court never addressed the pass-through issue.

To determine which transaction resolves the rights of the parties, Hoover Treated focuses on the language of the Code. Article 2 of the UCC applies only to "transactions in goods." § 8.2-102. "Goods" are defined as "all things . . . which are moveable at the time of identification to the contract for sale." § 8.2-105. Hoover Treated then argues that, since Winchester is the assignee of the homeowners, the only relevant contracts are those involving the homeowners. Since the FRTP was not movable when identified by the homeowners' contracts of sale, the UCC is inapplicable.

This analysis is not self-evident. Virginia is unique among the states because it has an anti-privity statute while the UCC's applicability in other states is more circumscribed. Virginia Code § 8.2-318, in pertinent part provides:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express, implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.

Code § 8.2-318 allows the UCC warranties to extend down the chain of distribution. Hence, citation to the simple UCC language, such as "transactions in goods" or "identification to the contract of sale," is not dispositive of the issue. The question remains as to which transaction should be examined to determine whether the transaction involves "goods." If the first transaction is focused on, the homeowners in this case would likely fall within the language of the anti-privity statute because the FRTP

constituted "goods" at that time and the homeowners were "person[s] whom the manufacturer . . . might reasonably have expected to use, consume or be affected by the goods." § 8.2-318.

Nonetheless, the Court finds since the FRTP was subsequently incorporated into realty, extending the UCC's applicability under § 8.2-318 to such building components, would be against public policy.[3] Hence, the second transaction determines the rights of the parties.

Virginia Code § 8.1-102(2)(c) states that an underlying purpose of the UCC is "to make uniform the law among the various jurisdictions." No case cited by either party indicates that the § 8.2-318 pass-through feature makes the UCC applicable to realty.[4] Indeed, if the UCC was interpreted to apply to components incorporated into realty, the result would be extraordinary. *See supra* n.2. While § 8.2-318 obviously relaxed the UCC requirement

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[3] Home appliances, such as dishwashers, refrigerators or air conditioning units, may remain "goods" under the UCC. *See, e.g.*, § 8.2-107. However, building components, such as mortar, dry-wall and plywood that are transformed into a building, would not stand on the same footing as "goods" under the UCC. The Court also notes that a different case would be presented if the parties were in direct privity. In such a case, there would be need to rely upon § 8.2-318.

[4] *See Coakley & Williams, Inc. v. Shatterproof Glass*, 778 F.2d 196, 198 (4th Cir. 1985) (interpreting an analogous Maryland statute which differs from Virginia statute because Maryland expressly eliminated privity by expanding definition of seller while Virginia expanded definition of buyer and seller); *Fair Hill Condominium v. Olney Center, et al.*, At Law No. 72478 (Montgomery Co. Cir. Ct. Md.) (same); *Herman v. Bonanza Builders, Inc.*, 390 N.E.2d 536 (Neb. 1986) (court looked at transaction between builder and consumer because that was only transaction before court); *Twin Lakes Mfg. Co. v. Coffey*, 222 Va. 467, 473 (1981) (holding a mobile home is a good); *Baham v. General Shale*, 377 S.E.2d 830 (W.Va. 1988) (irrelevant as indicated by note 1 in Winchester's Response); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980) (same).

of privity, it did not extend privity so far as to eviscerate the Code's uniform inapplicability to realty.

Another policy reason § 8.2-318 should not be interpreted to apply to building components is that component manufacturers would then become the primary warrantors of residential housing instead of developers, and such a change would have broad economic consequences. Currently, the UCC implied warranties do not pass to the purchasers of residential housing. Rather, purchasers receive consumer protections under Virginia Code § 55-70.1 from the developer. Under § 55-70.1, the developer bears the economic costs of faulty construction and may bargain with the purchaser and disclaim the statutory warranties.

If the UCC were interpreted to apply to the purchase of residential housing, there would be dramatic economic consequences. If the UCC implied warranties given by the component manufacturer pass through to the purchaser of residential housing, the developer would have no incentive to extend warranties. Consumers would then look to the component manufacturer instead of the developer for protection, and the protections given by the General Assembly under Code § 55-70.1 would be irrelevant.[5] Furthermore, the potential liability of the compo-

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[5] The interpretation of § 8.2-318 extending the UCC to building components is not warranted by the equities of this case. Winchester provided an extensive homeowner's warranty insurance policy to its customers. That policy excluded roof sheathing and, therefore, could not form the basis of Winchester's cause of action. In the homeowners' sales contracts, Winchester expressly disclaimed all implied statutory warranties under Code § 55-70.1 and all other express warranties. Winchester now asserts that Hoover Treated extended express and implied warranties in an effort to place the economic costs of roof replacement upon Hoover Treated. If this Court were to interpret the UCC to apply to the homeowners, it would be extending more protection to the homeowners than Winchester actually provided. This is not a case where consumers have fallen through their roofs or where consumers have been personally or financially injured. Winchester has replaced all of the affected roofs. Hence, this case involves nothing more than the shifting of economic costs.

nent manufacturer would increase as additional uses of the manufacturer's product would then be under warranty. This, in turn, would result in increased component costs as the manufacturers attempt to spread the costs of greater liability to consumers.

Finally, and perhaps most importantly, the Virginia Supreme Court has held that where the change in the law is significant, the proper forum to address the issue is the General Assembly, not the courts.[6] In *Bruce Farms, Inc. v. Coupe*, 219 Va. at 293, 247 S.E.2d at 404, the Court held that:

> [where an issue involves] a multitude of competing economic, cultural and societal values . . . courts are ill-equipped. . . . On the other hand, the legislative machinery is specially geared to the task. A legislative change in the law is initiated by introduction of a bill which serves as public notice to all concerned. The legislature serves as a forum for witnesses representing interests directly affected by the decision. The issue is tried and tested in the crucible of public debate. The decision reached by the chosen representatives of the people reflects the will of the body politic. And when the decision is likely to disrupt the historic balance of competing values, its effective date can be postponed to give the public time to make necessary adjustments.

The Court finds that the General Assembly has not sufficiently indicated an intent to extend the UCC under § 8.2-318 to include building components. Arguments

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[6] The General Assembly has been investigating the Commonwealth's FRTP problems. The Department of Housing and Community Development submitted a report to the Assembly in its 1993 session in which the Department recommended extending the protections of Code § 55-70.1 to include FRTP roof sheathing. Department of Housing and Community Development, Report to the General Assembly of 1993, H. Doc. 24, at 10, 13, 15 (1993).

extending the UCC's applicability should be addressed to the legislature, not to this Court.

Therefore, the Court holds that the appropriate transaction to focus on is the second one, which involves Winchester's sale of townhomes to the homeowners. As a result of the public policy considerations stated above, Winchester may not focus solely on the transaction between it and Hoover Treated, and no UCC warranties passed through to the homeowners, or to Winchester as their assignee, from Hoover Treated under § 8.2-318. The second transaction determines the rights of the parties. The UCC did not apply to this transaction because it involved realty. *Bruce Farms, Inc.*, 219 Va. at 289 n.1, 247 S.E.2d at 402 n.1. Accordingly, Winchester lacks a cause of action, and the Court grants the Application for Judgment Notwithstanding the Verdict and will enter an order granting judgment to the Defendant.

Since the Court holds that the UCC is inapplicable, the Court's determination of this threshold issue moots the remaining matters in the Application for Judgment Notwithstanding the Verdict as well as Winchester's Motion to Confirm Damage Award.[7]

II. MOTION FOR SANCTIONS

The Court overrules Winchester's Motion for Sanctions. This was a very complex case in which the Third Amended Motion for Judgment was more than 150 para-

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[7] The Court notes that both parties objected to the Court's use of a special verdict form. The Court ruled that a special verdict form was necessary in this complex case in order to guide the jury in its deliberations. *Cf.* § 8.01-377 (Repl. Vol. 1992). The Court opines that the verdict form is useful to the trial and appellate courts in reviewing the jury findings regarding multiple warranty claims in complex litigation. Further, the use of special verdict forms is recommended by the Manual For Complex Litigation. *Manual for Complex Litigation, Second* § 21.633 (1985).

graphs long. The Court has conducted at least five hearings on dispositive motions.

In general, the Court believes that each side in this dispute has spent a significant amount of time and money bringing sanctions against each other. Hoover Treated joined a Joint Motions for Sanctions, which was heard after the September 16, 1992, hearing and was based upon Winchester's failure to assert valid claims for indemnification and subrogation. The Court overruled this motion. Winchester now has filed a motion for sanctions since the jury has returned a verdict in its favor.

Sanctions are not appropriate merely because a party loses a motion or a case. Nor are sanctions appropriate because a defense is ultimately unsuccessful. Rather the standard is whether counsel has filed a pleading that is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." § 8.01-271.1. Since Hoover Treated has prevailed in its Application for Judgment Notwithstanding the Verdict, it had an adequate basis, "warranted by existing law," for denying liability. Therefore, the Court overrules the Motion for Sanctions.

Counsel for Defendant Hoover Treated will please prepare an order consistent with this opinion and in compliance with Virginia Supreme Court Rule 1:13 and submit it to Counsel for Winchester for endorsement as to form and presentment to the Court, preserving all exceptions to the ruling.

Cordially yours,

/s/ Gerald Bruce Lee
GERALD BRUCE LEE

GBL/llr

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 100865
JUDGE GERALD B. LEE

WINCHESTER HOMES, INC.,
Plaintiff,

v.

HOOVER UNIVERSAL, INC. *et al.*,
Defendants.

FINAL JUDGMENT ORDER

THIS CASE having come on for trial on November 2, 1992, on Plaintiff's Third Amended Motion for Judgment, and Defendant's answer thereto; and a jury having been duly empaneled and sworn; and, following opening statements, the presentation of testimony and documentary evidence on behalf of Plaintiff having commenced on November 3, 1992, and been concluded on November 12, 1992; and Defendant's Motion made at the conclusion of the Plaintiff's case to strike the evidence having been denied by the court; and the presentation of testimony and documentary evidence on behalf of Defendant having commenced on November 12, 1992, and been concluded on November 19, 1992; and Plaintiff's motion made at the conclusion of the Defendant's case for entry of judgment in favor of the Plaintiff having been denied by the court; and the presentation of rebuttal testimony and documentary evidence on behalf of the Plaintiff having commenced and concluded on November 19, 1992; and Defendant's motion made at the conclusion of all

the evidence to strike the evidence having been denied; and the Plaintiff's motion made at the conclusion of all the evidence for entry of judgment in favor of the Plaintiff, having been denied; and the court, after full consideration of proposed jury instructions submitted by both parties, having instructed the jury as to the law of case; and, following closing arguments, the jury having begun deliberation on November 23, 1992, and having returned its verdict on November 24, 1992, in accordance with the special jury verdict form which it completed finding in favor of the Plaintiff on the issues of express warranty and warranty for a particular purpose and in favor of the Defendant on the issues of implied wararnty of merchantability and failure to warn as is reflected in the jury special verdict from attached as Exhibit A; and the members of the jury having individually acknowledged that the verdict of the jury was their verdict after having them polled at the Defendant's request;

WHEREUPON, the Defendant Hoover Treated Wood Products, Inc. filed an application for judgment notwithstanding the verdict or for a new trial; and

WHEREUPON, the Plaintiff Winchester Homes, Inc. filed a motion to conform the damage award to evidence presented and a motion for sanctions, and

WHEREUPON, the court entertained oral argument on said motions

UPON CONSIDERATION of the parties' motions and application and argument on the same and for reasons stated in this court's letter opinion dated April 16, 1993, the court hereby grants and sustains the Defendant's application for judgment notwithstanding the verdict and overrules the Plaintiff's motion to conform damage award and motion for sanctions; and, it is therefore

ADJUDGED, ORDERED AND DECREED that judgment be entered in favor of the Defendant Hoover

Treated Wood Products, Inc. and that the Plaintiff's Third Amended Motion for Judgment be and the same hereby is dismissed with prejudice; it is further

ORDERED that the defendant may submit such requests for costs as the law may allow.

THIS ORDER IS FINAL. This order is suspended for thirty days pending further order of the Court. G. B. Lee.

ENTERED this 25th day of June, 1993.

/s/ Gerald B. Lee
THE HONORABLE GERALD B. LEE

WE ASK FOR THIS: Object as to denial of costs by 2 as to suspension

SICILIANO, ELLIS, DYER & BOCCAROSSE

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SEEN AND EXCEPTIONS NOTED:

Jackson & Campbell P.C.

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ADDENDUM A TO THE FINAL JUDGMENT
ORDER OF JUNE 25, 1993

THIS MATTER comes before the Court on the entry of this Addendum A to the Final Judgment Order of June 25, 1993, said order being fully incorporated herein by reference;

WHEREUPON the Final Judgment Order of June 25, 1993, is hereby amended to incorporate this Addendum A; and, it is therefore

ORDERED that, Defendant Ply Gem Industries, Inc., having previously moved for severance and this court having granted severance for the reasons stated in its ruling of October 8, 1992, judgment shall be entered in favor of Defendant Ply Gem Industries, Inc.; it is further

ORDERED that this Order shall be attached as "Addendum A" to the Order of June 25, 1993.

THIS ORDER IS FINAL.

ENTERED nunc pro tunc July 25, 1993.

/s/ Gerald B. Lee
THE HONORABLE GERALD B. LEE

WE ASK FOR THIS:

SICILIANO, ELLIS, DYER & BOCCAROSSE

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OFFICIAL TRANSCRIPT
BEFORE THE
VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 100865

WINCHESTER HOMES, INC.,
Plaintiff,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Defendant.

Fairfax, Virginia—Thursday, August 15, 1991

HEARING BEFORE: HON. WILLIAM G. PLUMMER

* * * *

There is not a tort of loss of business reputation. That is the damage, the injury, that is measured in part by loss of profits. Your Honor pointed out last time that we had not alleged pecuniary damages. We had not. We have corrected that by specifically alleging pecuniary damages.

Under the Virginia Uniform Commercial Code you are specifically allowed to allege and recover loss of profits in breach of warranty cases, specifically such as this. I would refer your Honor to 8.2-715 of the Code of Virginia.

We have made those specific allegations. And as such, Winchester has standing in its own right above and beyond just the money it's going to have to expend to inspect and repair the roofs.

JUDGE PLUMMER: Go ahead.

MR. McMANUS: In terms of assignments, we have affirmatively alleged we have assignments.

JUDGE PLUMMER: From whom?

MR. McMANUS: From the townhome owners.

JUDGE PLUMMER: All 1,500?

MR. McMANUS: Not all 1,500, no, sir. That is a question of fact. We are talking about our pleadings here.

JUDGE PLUMMER: I am sorry. I might as well cut in on this because I am going to do something that nobody has asked me to do. But I think it is necessary to get this case moved along.

I look at this case somewhat at the present stage down there as Pandora's Box. I do not know what is in there. Nobody knows what is in there, at least none of the defendants nor the court knows what is in there.

I am going to do something which will open it up. I do not believe you have plead assignment or subrogation sufficiently because it is just a generality. About 15 townhouses, now. You cannot have the same exact assignment or subrogation on all 15 houses. Have you repaired all 15? Have you taken assignments from all 1,500? What right of subrogation would you have on those that you do not have assignments? There are number of things.

But I am going to, in lieu, of sustaining the demurrer on this issue of standing on assignments and subrogation, I am going to order the plaintiff to file an extensive bill of particulars which will serve two purposes. One, is advising who is getting sued for what, which is the primary purpose of the pleading. And secondly, it might eliminate a lot of extensive discovery. We have not gotten into discovery yet. I think this might help in both ways.

I am going to order a bill of particulars, and I am subject to suggestion as to various elements, but these

are the ones that I have considered and this is with reference to each townhouse you claim you have a right on. And that is, when did the plaintiff finish the construction on each townhouse, the full street address and town or city, or whatever it is, of each townhouse, when each townhouse was sold by Winchester, to whom was it sold, who is the present owner, do we have successors, when did the original owner take title, what was the date of that transfer.

Then we get to when had you inspected each townhouse, the results of that inspection showing whose plywood was used. And of course, you already alleged that certain defendants did the inspection and testing for various suppliers. I guess they could determine from that when you say who provided the plywood, they know who tested their plywood. If you are claiming assignment, a copy of the assignment on each townhouse where you claim you have standing by way of assignment.

With regard to your standing through subrogation, same thing except instead of a copy of the assignment, just how did you become subrogated. I guess that is a general thing. If you did not get an assignment from the townhouse owner, why do you have a right to pursue it any more than they do? I mean, usually in subrogation you give up your rights to the subrogee. And I do not know how you are going to show that, frankly, if you do not have an assignment.

Any way you can spell that out with the other information that I have ordered as far as the bill of particulars is concerned as to how you became and when did you become the subrogee.

MR. McMANUS: May I respond to that as part of our record-making procedure here, Judge?

JUDGE PLUMMER: Sure.

MR. McMANUS: First of all, I would suggest that the law of Virginia requires the clerk to accept the pleadings. This is not a motion to strike the plaintiff's evidence at the close of its case.

JUDGE PLUMMER: I said this was something unusual. This is an unusual case that has been put upon this court. It is extremely unusual, multiple defendants, some of which have absolutely nothing to do with each other, not a joint venture. They had no relationship whatsoever. They were competitors. They wanted to beat each other out.

I can sustain the demurrers on standing and you come back again and try again. And they are going to file another demurrer. And I may have to sustain it again. And we can keep going forever. That is why I am going to order a bill of particulars in lieu of an amended, giving broad information so that we can get perhaps to trial in February.

MR. McMANUS: I understand that, Judge. And all I'm suggesting is that's the appropriate means of getting the information that they are complaining of now. The pleadings themselves must be accepted as true. We have alleged assignment. We have alleged that the townhome owners, all of them, have provided us—

JUDGE PLUMMER: You do not have an assignment from each townhome owner against each of these defendants.

MR. McMANUS: We have over 1,200 assignments, Judge.

JUDGE PLUMMER: Fine, then you can tell them who you are making these claims against.

MR. McMANUS: Exactly. That is my point, your Honor. But that goes more to a bill of particulars than a demurrer.

JUDGE PLUMMER: That is what I am ordering.

MR. McMANUS: I understand that. So I would ask your Honor overrule the demurrers because on the face the four corners of the pleading—

JUDGE PLUMMER: All I am saying is I am doing this in lieu of sustaining the demurrers. This is another remedy to sustaining. Because I think we are going to get to the issue quicker this way.

I am using some extraordinary steps in a very extraordinary case.

MR. McMANUS: We will provide that information.

JUDGE PLUMMER: 30 days?

MR. McMANUS: I think we could probably do it sooner than that.

JUDGE PLUMMER: You can do it sooner than that. As soon as you want or as soon as you are capable of it.

You have to do 1,400 assignments showing when it was finished, when the purchaser got it, et cetera. It is going to take you time. So I will give you 30 days.

MR. McMANNUS: All right, sir.

JUDGE PLUMMER: Let us get on to the other one. So that probably—let us see what else we have here.

It would affect his second ground and that is identifying which wood was used in which townhouse. So that bill of particulars will cover his B grounds. The first one was A grounds. This is B grounds.

So that will take care of demurrer A and B.

McManus?

MR. McMANUS: Yes, sir, if I might just briefly speak to that. I understand your Honor's ruling.

I would just like to point out that we have alleged and will prove at trial that the product supplied by each of the defendants is inherently and uniformly defective. And they gave us a defective product. And no matter where it went into which roof, is irrelevant because it is going to degrade and require that that roof be replaced.

JUDGE PLUMMER: You may be able to prove that. But still, if you are taking an assignment, you can only recover against the person who provided the wood for that house.

MR. McMANUS: There is no question about that, Judge.

JUDGE PLUMMER: We may end up having a series of trials. Are you going to try all the cases against one defendant on those assignments and then go on to

the next defendant and try all those cases because I cannot see these being joint and several.

You have some people who did not supply wood for some of the townhouses.

MR. McMANUS: There is no question about that, Judge.

The question is those are issues of damages. Those are not issues of whether we have identified and clearly stated a cause of action against each of the defendants.

* * * *

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 93-1557

WINCHESTER HOMES, INC.,
Plaintiff-Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Defendants-Respondents.

PETITION FOR REHEARING

Petitioner Winchester Homes, Inc. ("Winchester"), by counsel, petitions the JUSTICES of this Court for rehearing of its Petition for Appeal which was refused by this Court on March 2, 1994.

On November 2, 1990, Winchester commenced this products liability lawsuit in the Circuit Court of Fairfax County to recover its damages as a result of its purchase of the defendants' defective products.

Winchester, a builder of residential homes, purchased the defendants' defective fire retardant treated plywood ("FRT plywood"), and before the defect became apparent installed it into the roofs of over 1,300 Virginia townhomes. Thereafter, Winchester received reports of the degradation of the FRT plywood, threatening the safety and structural integrity of the roofs. Winchester inspected and replaced the defective FRT plywood to avoid liability to townhome owners and to protect its reputation as a builder. It seeks as its compensatory and consequential damages the costs for this inspection and replacement.

In this case the trial court erroneously denied (on demurrer at the earliest pleadings stage of the case) plaintiff Winchester's standing to sue for its purchase of goods from the defendants, despite Winchester's absolute right to do so as mandated by the Legislature's enactment of the Uniform Commercial Code. The trial court erroneously eliminated hundreds of thousands of dollars of Winchester's recoverable damages by invading the province of the jury in making factual determinations (again at the pleadings stage and without discovery) as to which of defendants' advertising and sales-related statements were warranties of future performance and which were not, and by denying the recognized doctrine of equitable estoppel in making these statutes of limitations rulings. And the trial court dismissed, without discovery, allegations of fraud, not because the alleged statements of fraud were not specific enough or because the statements were not clearly attributable to the respective corporate defendants, but rather by interposing a new element for fraud not required by law, namely that a plaintiff, at the pleadings stage, must identify the specific person authorizing the statements made in *corporate* brochures and documents.

This Court has determined that none of the above is "reversible error." For the reasons set forth below, Winchester respectfully disagrees, and asks this Court to reconsider and change its prior decision.

Because of the recognized time constraints placed on appellate tribunals, they understandably often concentrate on core issues that, once decided, render unnecessary inquiry into any remaining assignments of error. In this case standing is such a core issue, for the trial court ruled at the beginning of the case that Winchester did not have standing in its own right (as purchaser of the defective FRT plywood), and, at the end of the case, that Winchester did not have standing as the assignee of the homeowners. It follows that if nobody has standing to

sue for a defective product, nothing else that happened in the case much matters. Therefore assuming, perhaps presumptuously but with no disrespect intended, that standing may have been such a core issue for this Court, Winchester will concentrate its discussion on that issue. It is also the clearest example of reversible error.

In examining whether or not reversible error was committed by the trial court's rulings on standing, the analysis must focus on two factors: what did Winchester plead in its motion for judgment, and what is the law of Virginia, as mandated by the legislature. Proper consideration of these two factors establishes that reversible error was committed by the trial court.

I. *Winchester's Pleadings*

In two recent cases, this Court observed that with increasing frequency trial courts are short-circuiting litigation pre-trial, deciding disputes without permitting the parties to reach trial on the merits. *Renner v. Stafford,* 245 Va. 351 (1993), *Catercorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22 (1993). In *Renner,* a case dismissed on summary judgment, this Court reiterated the long-standing rule that a court "must adopt those inferences from the facts that are most favorable to the nonmoving party, . . . the trial court is not permitted to adopt inferences from the facts that are most favorable to the moving party." *Renner* at 353. The trial court's dismissal was reversed because the medical evidence supporting the plaintiff's theory of the case had not been fully developed. Paying deference to the plaintiffs pleadings, this Court allowed that the plaintiff was entitled to attempt to prove the case she plead.

In *Catercorp* this Court reiterated Virginia's longstanding rule that

> A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly

> can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged. When a motion for judgment or a bill of complaint contains sufficient allegations of material fact to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer. And even though a motion for judgment or a bill of complaint my be imperfect, when it is drafted so that the defendant cannot mistake the true nature of the claim the trial court should overrule the demurrer. . . .

246 Va. at 24.

Examination and reiteration of these basic legal principles relating to pleading is necessary here because they are no less applicable to Winchester than they were to the *Renner* and *Catercorp* plaintiffs, or any other litigant who comes before a Virginia court.

Somehow and in some way what Winchester plead in its lawsuit has been lost or ignored, and its case twisted into something wholly different from that plead by it. The trial court, not Winchester, made this into a case about the purchase and/or ownership of townhomes instead of FRT plywood. And it was the trial court that denied Winchester's standing in its own right, forcing it to proceed as assignee of townhome owners.[1]

Winchester can only surmise that the focus of the case was shifted from its purchase of the defective FRT ply-

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[1] On JNOV the jury verdict against Hoover Treated was set aside. Because Winchester had been forced to proceed as assignee of the homeowners, the trial court erroneously shifted the focus of the case from Winchester's purchase of a good, the FRT plywood, to the homeowners' purchase of a townhome. Had Winchester's original pleadings been accorded as they were entitled to be, this unnecessary shifting of focus could not have occurred. The JNOV ruling serves only to magnify the original error of denying Winchester standing in its own right.

wood to the townhomes because the townhomes became so integral to other issues in the case, thus leading to confusion about the correct subject of Winchester's cause of action. For example, the *measure* of Winchester's compensatory and consequential damages as allowed by the UCC was based on the cost to inspect and repair each individual townhome, therefore each townhome had to be considered; townhomes became significant because that is where the defendants' goods ended up, so it was necessary to identify the townhomes to determine the extent of each defendants' liability, and because products of multiple defendants were often found in individual townhomes, another factor in determining the extent of each defendants' liability; and the trial courts rulings on the statute of limitations drew a line through the total universe of houses in the litigation, so that those townhomes containing FRT plywood built on one side of that line were still in the case, while those built with FRT plywood on the other side were out.

While the trial courts apparent confusion may be understandable, it is legally and intellectually void.

Winchester's pleadings were improperly ignored. Winchester sued to recover damages for *its* purchase of *goods* from the defendants. More specifically, in its original motion for judgment Winchester alleged that:

> 23. Plaintiff is, and at all times relevant hereto, was engaged in the business of developing and constructing residential properties, including townhomes, which are subsequently sold to homebuyers.
>
> 26. Beginning in 1983, plaintiff purchased FRT plywood for use as fire retardant roof sheathings in the construction of the roofs of at least 1,400 residential buildings it developed, constructed, and subsequently sold to homebuyers throughout Fairfax County and the Commonwealth of Virginia.
>
> 27. Upon information and belief, FRT plywood purchased and used by plaintiff in the building and

construction of townhomes was developed, manufactured, produced, tested, inspected, marketed, sold and distributed by defendants Hoover, Hoover Universal, Ply-Gem Industries, Johnson, Osmose, Applied Research, Hickson USA Corporation, Hickson International, Inc., A.C. Chemical, Reliance, Mid Atlantic, Allied, Chesapeake and Timber Products (hereinafter all defendants will be collectively referred to as "the defendants").

29. The FRT plywood used by plaintiff in the construction of many of the roofs in the residences it built has begun to degrade and deteriorate, significantly weakening the roofs and resulting in substantial impairment of the strength and structural integrity of the roofs. Because of the degradation and deterioration of the FRT plywood, the roofs are, or will soon become, unsafe and dangerous, threatening the safety of the occupants of the homes and any other persons who may have cause to be on the roofs.

30. In order to return the residences to a safe condition, FRT plywood used to construct the roofs must be replaced and the roofs repaired. In addition, the roofs of the homes built by plaintiff throughout Fairfax County and the Commonwealth of Virginia, which contain FRT plywood, must be inspected to determine the extent of the degradation and deterioration.

61. At the time the FRT plywood was sold and delivered to plaintiff, defendants impliedly warranted that the FRT plywood purchased by plaintiff was merchantable and fit for the ordinary purposes for which it was to be used and for which it was designed, specifically, to provide durable roof sheathing for the roofs of the residences built by plaintiff.

62. Plaintiff relied on the implied warranties of defendants when it purchased FRT plywood and

used it as fire retardant roof sheathing in the construction of the roofs of the residences it built and subsequently sold to homebuyers.

63. Defendants breached said warranties in that the FRT plywood sold and delivered to plaintiff was not merchantable or reasonably fit for use as a roofing member. Specifically, defendants breached said warranties in ways which include, but are not limited to, selling and distributing FRT plywood to plaintiff which, under normal conditions, usage, and applications, was likely to degrade and deteriorate, resulting in the substantial impairment of the strength and structural integrity of the roofs in which it was used, and rendering the FRT plywood defective as roof sheathing.

64. As a direct and proximate result of the breach of the implied warranties by defendants, plaintiff has incurred and will continue to incur damages which include, but are not limited to, costs to inspect the roofs constructed with defendants' FRT plywood, to notify the affected homeowners, to replace and repair the affected roofs, and to restore the affected residences to a safe condition.

65. As a further direct and proximate result of the breach of implied warranties by defendants, plaintiff has suffered and will continue to suffer irreparable harm to its business reputation in the housing development industry and in the homebuying community.

It is these facts, pursuant to *Renner, Catercorp,* and longstanding Virginia law, that the trial court was *required* to accept. This case is about the purchase of plywood, not townhomes. If the nature of the degradation of the FRT plywood had become known to Winchester before it was used in the townhome construction, would anyone seriously contend that Winchester did not have

standing to sue? Of course not,[2] and the discussion below explains why Winchester's use of the FRT plywood in no way affects its standing to sue the defendants for their defective products.

II. *Virginia Law*

When analyzing a challenge to standing, the focus is on the party, and not the party's claim. The Virginia Supreme Court has recognized that "standing to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action." *Andrews v. American Health and Life Ins.*, 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988). "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 484 (1982) (quoting *Flast v. Cohen,* 392 U.S. 83, 99 (1968)). "Perhaps the most fundamental aspect of the standing doctrine is that it focuses on the particular plaintiff seeking to bring his claim before the federal court, not on the issues or merits of the case." *O'Hair v. White,* 675 F.2d 680, 685 (5th Cir. 1982).

Standing is concerned with the concept of a need to establish an entitlement to judicial action, separate from proof of the substantive merit of the claim advanced. "At times courts are tempted to draw from standing de-

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[2] The trial court implicitly agreed with this in its April 16, 1993 Opinion letter's analysis of the UCC, and defendant Hoover Treated, in its Reply Brief for its Motion for JNOV, flat out admits it: "HTWP agrees that a 'buyer' has standing to sue under the UCC . . . ('buyer' means a person who buys or contracts to buy goods). Indeed, if Winchester was the 'buyer' whose rights were litigated in this action, *it would have standing to sue.*" (at 2) (emphasis added). Winchester is the buyer whose rights should be litigated in this action. This is further supported by the jury's finding that Hoover had made and violated warranties to *Winchester.*

cisions in addressing such matters as the existence of a cause of action, identification of the real party in interest, capacity, intervention, and even the procedural rights of bankruptcy. Although such decisions may be aided by reference to standing doctrine, they involve other matters that will not be considered here." 13 Charles A. Wright, *et al., Federal Practice and Procedure* § 3531 (1984).

"Standing is a threshold inquiry; it requires focus on the party seeking to have his complaint heard in a federal court; and it eschews evaluation of the merits. The court is not to consider the weight or significance of the alleged injury, only whether it exists." *Coalition for the Env't v. Volpe,* 504 F.2d 156, 168 (8th Cir. 1974). There should be no confusion between the sufficiency of proof for a claim with the adequacy of an asserted interest. *Georgia Ass'n of Retarded Citizens v. McDaniel,* 716 F.2d 1565, 1572, *reh'g denied,* 721 F.2d 822 (11th Cir. 1983), *vacated on other grounds,* 468 U.S. 1213 (1984).

Winchester's standing is determined only by whether or not it "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Duke Power Co. v. Carolina Envt'l Study Group,* 438 U.S. 59, 72 (1978).

The Virginia General Assembly has established Winchester's standing in this case, and the trial court's ruling that Winchester lacked standing because it no longer owned the FRT plywood is reversibly erroneous. The Virginia Code defines a "buyer" as "a person who buys or contracts to buy goods" § 8.2-103(1)(a), and "goods" are defined as "all things . . . which are moveable at the time of identification to the contract for sale. . . ." Va. Code Ann. § 8.2-105(1). It is undisputed that at the time of purchase Winchester was a "buyer" and the FRT plywood was a "good" within the meaning of the Virginia Code.

As a buyer of goods, Winchester is entitled to recover for damages for breach of warranty,[3] including incidental and consequential damages, Va. Code Ann. §§ 8.2-714, 715, *i.e.*, the costs associated with the inspection and repair of the townhome roofs necessitated by the defective FRT plywood.

The fact that Winchester purchased the goods for incorporation into the townhome roofs does not remove that original purchase transaction from the scope of the UCC. The Virginia Code states that "each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies *irrespective of title to goods* except where the provision refers to such title," Va. Code Ann. § 8.2-401 (emphasis added), and neither the definition of a buyer nor the other provisions applicable to Winchester's purchase make any reference to title of the goods. In fact, the Code contemplates that a buyer may resell goods, and expressly allows consequential damages for any loss after resale. Va. Code Ann. § 8.2-715(2)(a) cmt. 6 (1992). See also Ronald A. Anderson, *The Uniform Commercial Code* § 2-103:6 (3d ed. 1981); *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980); *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853 (4th Cir. 1959); *Step-Saver Data Sys. v. Wyse Tech.*, 912 F.2d 643 (3rd Cir. 1990).

In the face of such unmistakable standing rights granted by the Legislature, it was reversible error for the trial court to deny Winchester's standing.[4] Indeed, the reversi-

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[3] The issue of whether or not a warranty was made and, if so, whether that warranty was breached is a question of fact for the jury. *Medcom, Inc. v. C. Arthur Weaver Co., Inc., et al.*, 232 Va. 80 (1986). This maxim is no less applicable to warranties of future performance, the trial courts determination of which constitutes another instance of reversible error.

[4] From that flowed the other reversible errors Winchester raised in its Petition for Appeal, but which are not discussed here because of space limitations.

ble error is so great as to violate Winchester's due process rights pursuant to Article I, Section 11 of the Constitution of Virginia and the 14th Amendment to the Constitution of the United States.

A cause of action for damages is a property right and cannot be taken without due process. *In Re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 765 (3rd Cir. 1989) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). And while a litigant is not entitled to any particular result, he or she is guaranteed the substantial right to redress by some effective procedure. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1993). Here, because of the denial of standing Winchester has been deprived of any procedure by which to proceed with its cause of action, a cause of action authorized by the General Assembly. Winchester does not raise this due process argument (nor the separation of powers argument discussed below) as new grounds of appeal, but simply points them out to demonstrate to the Court *why* the actions of the trial court constitute reversible error.

The trial court's action also violates the Separation of Powers principal so fundamental to our tripartite system of government. Article I, Section 5 suggests, and Article III, Section 1 of the Constitution of Virginia mandates, that the "legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than any of them at the same time." Article IV, Sections 14 and 15 of the Constitution of Virginia provide that, "the authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted," and that, "[i]n all cases enumerated in the preceding section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws." Article I, Section 7 states that, "[a]ll power of suspending

laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

No such power or authority to make or suspend law is granted to the judiciary, with one exception: the Constitution of Virginia grants the Supreme Court appellate jurisdiction in cases involving determination of the constitutionality of a law. The constitutionality of the applicable provisions of the UCC are not at issue in this case, however, and therefore neither the trial court nor this Court has the power or authority to ignore the provisions of law enacted by the legislature. As this Court has recognized that a court's attempt to amend an ordinance and reduce a jail term violates the separation of powers, *Boyles v. City of Roanoke,* 179 Va. 484 (1942), neither can a court deprive a litigant of its rightful standing [5] as provided by the General Assembly.

By suggesting that there is no reversible error, this Court is accepting the trial court's express rejection of the sole authority of the legislature to make the law of Virginia, and by doing so has denied Winchester's access to the court system. This access is guaranteed by the constitutions of Virginia and the United States and is a fundamental right, the denial of which must be recognized as reversible error.

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[5] The trial court also ignored longstanding Virginia law on subrogation when it made its standing decision. In *Morgan v. Gollehon,* 153 Va. 246, 249, 149 S.E. 485, 486 (1929), this Court recognized that subrogation arises where one pays a debt out of the necessity of self-protection. To avoid liability and to protect its reputation as a builder, Winchester inspected and repaired the roofs, thereby discharging the debt owed by defendants to the homeowners. As a result, a subrogation claim arose in Winchester's favor. The trial court again disregarded Winchester's pleadings. When ruling on the demurrers, the Circuit Court was obligated to accept as true Winchester's allegations of injury to itself, involving lost profits and damages to inspect and repair roofs. These allegations were sufficient to establish Winchester's standing by way of subrogation.

III. *Conclusion*

The judgment below produces an extraordinary result. Defendants' FRT plywood has been found defective. The jury below considered the evidence and found in favor of Winchester. Yet the trial court's rulings have allowed the manufacturers and sellers of this FRT plywood to avoid liability in tort, contract and by statute. The FRT plywood buyer, consumer, and user are without any remedy under Virginia law. This is directly contrary to the General Assembly's express intent to promote fair and ethical standards of dealings between suppliers and the consuming public. See Va. Code Ann. § 59.1-197.

Contrary to the suggestion of the trial court, this is not a matter for action by the legislature. The legislature long ago did its job by providing a remedy for claims like Winchester's. Now the judiciary must allow Winchester its rightful opportunity to enforce that right by trying the case it plead. Winchester's pleadings were ignored, and denial of Winchester's standing in its own right was reversible error. Winchester respectfully requests that its Petition be accepted.

Respectfully submitted,

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VIRGINIA

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

At Law No. 100865

WINCHESTER HOMES, INC.,
Individually and as Successor
in Interest to Scarborough
Corporation, Virginia Division,
Plaintiff,

v.

HOOVER UNIVERSAL, *et al.*
Defendants.

HOOVER'S REPLY IN FURTHER SUPPORT OF ITS APPLICATION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

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Products, Inc.

* * * *

ARGUMENT

I. WINCHESTER, AS ASSIGNEE OF THE 173 HOMEOWNERS, CANNOT SUE FOR BREACH OF WARRANTY UNDER THE UNIFORM COMMERCIAL CODE.

To avoid a judgment notwithstanding the verdict in favor of HTWP, Winchester claims that the applicability of the Uniform Commercial Code ("UCC") depends upon the sale of FRT plywood from HTWP to Winchester. (Winchester Brief at 2-3). Claiming that it was the "buyer" of HTWP's FRT plywood, Winchester contends that it has "standing the (sic) sue." (Winchester Brief at 3). HTWP agrees that a "buyer" has standing to sue under the UCC. Va. Code Ann. § 8.2-103 ("buyer" means a person who buys or contracts to buy goods). Indeed, if Winchester was the "buyer" whose rights were litigated in this action, it would have standing to sue. Winchester, however, was not the "buyer" whose rights were litigated. As stated by this Court, "Winchester is before the Court as the assignee of the homeowners." (November 12, 1992 transcript at 47; Exhibit A). As an assignee, Winchester merely litigated the rights of the homeowners. *See Fidelity & Cas. Co. of N.Y. v. First Natl. Exc.*, 193 S.Ed.2d 678, 684 (Va. 1973).[1]

Because the homeowners were the "*buyers*" whose rights were litigated, this Court must determine the applicability of the UCC from their perspective, *not* Winchester's. This point is keenly illustrated by the following cases which were discussed in Point I

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[1] Recognizing the constraints that accompany its rights as assignee, Winchester attempts to expand the scope of its legal authority by asserting that it has "standing not only as assignee, but as subrogee and indemnitee." (Winchester Brief at 2). This is wrong. Judge Plummer's October 9, 1992 Order made clear that Winchester could proceed to trial *only* as a subrogee or indemnitee if it had repaired or replaced a roof prior to September 16, 1991. (Exhibit B). Of the 173 roofs at issue in this case, not one had been repaired or replaced by September 16, 1991. Accordingly, Winchester proceeded to trial as assignee of the homeowners and nothing more.

ADDENDUM OF RELEVANT VIRGINIA STATUTES

§ 8.2-103. Definitions and index of definitions.—

(1) In this title unless the context otherwise requires

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

§ 8.2-105. Definitions: Transferability; "goods"; "future" goods; "lot"; "commercial unit."—(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Title 8.8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 8.2-107).

§ 8.2-401. Passing of title; reservation for security; limited application of this section—Each provision of this title with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.

§8.2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of § 8.2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section [8.2-715] may also be recovered. (1964, c. 219.)

§8.2-715. Buyer's incidental and consequential damages.—

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.